IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 22 of 2007
WITH
CIVIL APPLICATION NO.981 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PATEL BALDEVBHAI RAMJIBHAI
Versus
PATEL VISHNUBHAI HARVODANDAS

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Appearance :
MR VASANT S SHAH for Appellant
MR NIRZAR S DESAI for Respondent

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 22/03/2007

ORAL JUDGMENT

ADMIT. Mr Nirzar Desai, learned advocate waives service of notice of admission on behalf of the respondent. With the consent of the parties, the matter is taken up for final disposal today.

By filing this appeal from order the appellant who is the original defendant in Summary Suit No.447 of 2007 has challenged the order passed by the learned trial Judge dated 21.11.2006 passed in Civil Misc. Application No.250 of 2006 by which the learned trial Judge has set aside the ex-parte decree passed and restored the suit by directing the defendant to pay Rs.25,000/- to the plaintiff within one month from the date of the order and the learned Judge also further directed that the defendant shall not withdraw the provident fund amount or gratuity amount as he is in government service, which is under challenge in this appeal from order.

The respondent – original plaintiff herein has instituted the suit for recovery of Rs.3,57,000/- with interest from the appellant – original defendant. According to the plaintiff, the defendant had given two cheques for settling the account, but on presentation, the said cheques have been bounced for which the plaintiff has already taken the proceedings under Section 138 of the Negotiable Instruments Act. The said suit is resisted by the appellant – original defendant. It is the case of the defendant that the said cheques were never signed by him and were not drawn from his account and that he has never signed those cheques. In the aforesaid suit, the original plaintiff submitted an application at Exhibit 8 for summons for judgment as said suit is a summary suit. Since the advocate of the defendant could not remain present on the relevant date, the learned trial Judge passed an ex-parte order on 31.8.2004 allowing the said application Exhibit 8 and the

defendant was granted leave to defend the suit on depositing principal amount of Rs.3,57,000/-. Since according to the defendant he was not aware about the said order, the amount could not be deposited within stipulated time. On 24.7.2006 i.e. the day on which the main matter was listed, the advocate for the defendant requested the Court to give some time as his client had taken away the brief from him (i.e., the present appellant) and that he wanted to retire from the matter. The learned trial Judge has not passed decree on the same. The learned trial Judge thereafter passed ex-parte decree on 24.7.2006. The appellant herein thereafter preferred an application for setting aside the said ex-parte decree and to restore the suit to file as the advocate for the defendant could not argue the matter on merits and that he has good prima facie case to defend the case. The learned trial Judge by the impugned order disposed of the said application being Civil Miscellaneous Application No.250 of 2006, which was filed for setting aside the ex-parte decree. The learned trial Judge has restored the suit being Summary Suit No.447 of 2001 by setting aside the ex-parte decree. However, the learned trial Judge imposed the condition to the effect that the original defendant should pay Rs.25,000/- within one month from the date of the order and that he should not withdraw his provident fund amount or gratuity amount which is payable to him by the Government as he is a Government servant. However, no such prayer was made by the plaintiff nor the learned advocate, Mr Desai is in a position to point out that any such prayer was made by the plaintiff by which the defendant was sought to be restrained from withdrawing the provident fund or gratuity.

Learned advocate, Mr V.S.Shah for the appellant submitted that the learned trial Judge has not clarified as to whether this amount of Rs.25,000 is to be paid towards part-payment of decretal amount or

towards cost. It is also submitted by him that the direction given by the learned trial Judge restraining him from withdrawing the provident fund or gratuity amount is contrary to law and no such direction could have been issued by the learned trial Judge.

Mr Nirzar Desai, learned advocate for the respondent submitted that the original plaintiff had not prayed for such direction and such direction seems to have been given by the learned trial Judge on his own. He, however, submitted that in the leave to defend application, which is decided ex-parte, the defendant was asked to pay the principal amount. But the defendant has not paid the same.

I have heard both the parties. So far as the direction of the learned trial Judge by which the defendant is restrained from withdrawing the provident fund and gratuity amount is concerned, Mr Nirzar Desai is not in a position to support the said direction. No such direction could have been issued by the learned trial Judge and when the learned trial Judge set aside the ex-parte decree such type of directions are uncalled for and the said direction is therefore required to be set aside and is accordingly set aside. So far as the amount of Rs.25,000/- which the learned trial Judge directed is concerned, the same shall be adjusted towards the payment of decretal amount.

Considering the aforesaid aspect of the matter, so far as the direction of the learned trial Judge to the defendant to deposit amount of Rs.25,000/- is concerned, time to deposit the same is extended up to 16.04.2007. Upon the said amount deposited, the plaintiff will be entitled to withdraw the same unconditionally. However, the same shall be subject to the final outcome of the suit. In case the suit is decreed, the same shall be adjusted towards the decretal dues. The other

direction about restraining the defendant from withdrawing the provident fund and gratuity amount is set aside.

Learned advocate for the appellant has undertaken before this Court that his counterpart in the trial Court will remain present before the trial Judge and will not ask for time and accordingly the leave to defend the application, which is also decided ex-parte, shall be taken up for hearing on merits again and in case defendant or his advocate does not remain present, the trial Court shall be free to pass appropriate order in accordance with law. The learned trial Judge shall decide the Notice of Motion on its own merits latest by 30.04.2007. Appeal from Order is accordingly partly allowed to the aforesaid extent.

In view of the disposal of the main appeal, no order is required to be passed on Civil Application No.981 of 2007 and the same is disposed of accordingly.

(P.B.MAJMUDAR, J.)

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